**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

In re:	Chapter 11
hhgregg, Inc., *et al.*,[1]	Case No. 17-01302-11
Debtors.	(Joint Administration Requested)

DEBTORS' FIRST DAY MOTION FOR AN ORDER, PURSUANT TO SECTIONS 105(a), 363(c), 503(b)(1), 1107(a), AND 1108 OF THE BANKRUPTCY CODE, AUTHORIZING (I) THE DEBTORS TO HONOR PREPETITION OBLIGATIONS RELATED TO CUSTOMER PROGRAMS AND CONSIGNMENT ARRANGEMENTS AND OTHERWISE CONTINUE CUSTOMER AND CONSIGNMENT ARRANGEMENTS IN THE ORDINARY COURSE OF BUSINESS AND (II) BANKS TO HONOR AND PROCESS CHECK AND ELECTRONIC TRANSFER REQUESTS RELATED THERETO

hhgregg, Inc. and its above-captioned affiliated debtors and debtors in possession (each, a "Debtor" and, collectively, the "Debtors") hereby submit this motion (the "Motion") for the entry of an order, substantially in the form attached hereto as Exhibit A, pursuant to sections 105(a), 363(c), 503(b)(1), 1107(a), and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code"), (i) authorizing, but not directing, the Debtors, in their business judgment, to continue, maintain, implement new, and/or terminate, and to pay, honor, and otherwise satisfy pre-petition obligations related to, their pre-petition customer practices and programs and consignment arrangements in the ordinary course of business and in a manner consistent with past practice, and (ii) authorizing banks and other financial institutions (collectively, the "Banks") to honor and process check and electronic transfer requests related to the foregoing. The facts and circumstances supporting this Motion are set forth in the

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: hhgregg, Inc. (0538); Gregg Appliances, Inc. (9508); HHG Distributing LLC (5875). The location of the Debtors' corporate headquarters is 4151 E. 96th Street, Indianapolis, IN 46240.

concurrently filed *Declaration of Kevin J. Kovacs in Support of the Debtors' Chapter 11 Petitions and First Day Motions* (the "First Day Declaration").[2] In further support of this Motion, the Debtors respectfully state as follows:

JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief sought herein are sections 105(a), 363(c), 503(b)(1), 1107(a), and 1108 of the Bankruptcy Code.

BACKGROUND

A. General

2. On the date hereof (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Concurrently with this Motion, the Debtors have also filed certain other motions and applications seeking certain "first day" relief.

3. The Debtors have continued in possession of their properties and have continued to operate and maintain their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. No request has been made for the appointment of a trustee or examiner, and no official committee has been established in these chapter 11 cases.

5. Additional information about the Debtors' business and the events leading up to the Petition Date can be found in the First Day Declaration, which is incorporated herein by reference.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

B. Customer Programs

6. Prior to the commencement of these chapter 11 cases, in the ordinary course of business, and as is customary in the retail sector, the Debtors instituted and engaged in certain activities to develop and sustain a positive reputation and relationship with their patrons and customers. To that end, the Debtors implemented the various customer programs and policies described in this Motion (collectively, the "Customer Programs"), which are designed to ensure customer satisfaction, develop and sustain customer relationships and loyalty, improve profitability, and generate goodwill for the Debtors and their products and services.

7. The Customer Programs are integral to ensuring the smooth functioning of the Debtors' business. As owners and operators of 220 brick-and-mortar stores in 20 states offering furniture, appliances and electronics, the Debtors have developed and designed various marketing strategies to generate business in the face of sophisticated competition. Among these strategies, are certain Customer Programs, promotions, and practices designed to enhance revenues by, among other things, encouraging repeat business and developing new customer relationships. As of the Petition Date, the Customer Programs consist of: (i) Gift Cards; (ii) the Rewards Program; (iii) Customer Deposits; (iv) the Return and Price Match Policies; (v) the Warranty Programs; (vi) the Repair Service Program; and (vii) various coupon and discount programs (as these capitalized terms are defined below).

8. The Debtors believe that they must promptly assure customers of their continued ability to satisfy prepetition and postpetition obligations under the Customer Programs to maintain their valuable customer base, goodwill, and a myriad of other important benefits derived therefrom, following the commencement of the these chapter 11 cases. Any inability of the Debtors to promptly honor these obligations would impair goodwill and may lead to the loss of customer patronage. Continued use of the Customer Programs, on the other hand, will enable

the Debtors to protect their customer base and revenue growth opportunities. Consequently, the Debtors seek the authority to maintain and administer the Customer Programs in the ordinary course of business.

9. The following are general descriptions of the Debtors' primary Customer Programs:

a. Gift Cards

10. The Debtors sell gift cards (the "Gift Cards") directly to customers that are accepted as payment for purchases in the ordinary course of business. The Gift Cards may be purchased at the Debtors' stores and, once purchased, may be used like cash for purchases made at the Debtors' stores,[3] but may not be redeemed for cash or monetary credit except under limited circumstances where required by applicable state law. The Debtors also (a) refund certain small amounts to customers by issuing Gift Cards, and occasionally (b) issue Gift Cards to promote customer satisfaction on a case-by-case basis. For example, the Debtors may issue Gift Cards to compensate customers whose property is damaged during delivery or installation of merchandise purchased from the Debtors. Upon purchase, the Gift Cards are "activated" and may then be redeemed at any time with no expiration date.

11. The Debtors maintain detailed transaction data regarding the sale of Gift Cards, and track both the actual amount of purchased Gift Cards outstanding and the anticipated amount of Gift Cards that will actually be redeemed. The Debtors do not consistently track, and have limited information about, the identity of the holders of Gift Cards.[4] Based on a review of their

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[3] During the past year, the Debtors began permitting customers to use Gift Cards when making online purchases; however, that practice has been suspended indefinitely due to fraud concerns.

[4] Customers have the option of entering holder information when they purchase Gift Cards but do not always choose to do so. Also, while the Debtors can identify customers that purchase bulk Gift Cards – e.g., to hand out at events or to distribute as gifts – they are not able to identify parties that ultimately receive such Gift Cards.

business records and prior holder activity, the Debtors expect that, as of March 3, 2017, the expected redemption value of outstanding Gift Cards is approximately $1,400,000.[5]

12. Because the Debtors administer the Gift Card program themselves, there are no administrative or service fees payable to third parties in connection with the Gift Card Program. The Debtors purchase plastic cards and supplies from vendors (the "Plastics Vendors") for use in connection with the Gift Cards and Rewards Program at a cost of approximately $0.30 per card.

13. The Debtors seek the authority to continue to honor the Gift Cards in the ordinary course of business during the pendency of these chapter 11 cases, whether purchased before or after the Petition Date, consistent with past practices, and to pay any outstanding prepetition obligations to relating to the Gift Cards including any amounts owed as of the Petition Date to the Plastics Vendors.

b. Rewards Program

14. The Debtors from time-to-time issue rewards cards to customers in connection with promotional events or campaigns (the "Rewards Program"). For example, under past promotions, the Debtors issued rewards cards to customers who purchased installation services or bedding. More recently, the Debtors conducted promotions that rewarded customers by issuing rewards cards of various amounts based on how much merchandise they purchased on certain scheduled "Bonus Days".

15. The rewards cards issued under the Rewards Program (the "Rewards Cards") are essentially identical to the Gift Cards described above and may be used like cash for purchases

[5] The face value of outstanding Gift Cards is approximately $2,107,000; however, in the ordinary course of business, the Debtors assign a lower expected redemption value based on historical usage.

made at the Debtors' stores. Unlike Gift Cards, Rewards Cards have an expiration date[6] and are issued and delivered to customers by a third party processor, Blackhawk. The Debtors do not have any Rewards Program promotions scheduled currently; however, the Debtors are still distributing Rewards Cards in connection with past Rewards Program promotions.[7]

16. Based on a review of their business records and prior holder activity, as of March 3, 2017, 33,000 Rewards Cards are outstanding with an expected redemption value of $1,441,000.[8] All outstanding Rewards Cards, along with those issued in the next few months, will expire on or before December 31, 2017.

17. The Debtors pay Blackhawk a fee of $1.61 per Rewards Card issued at the Debtors' request, and a separate fee approximately $3,000 each time Blackhawk takes possession of a new batch of Rewards Cards and completes associated coding and/or administrative tasks. Historically, the Debtors have delivered new Rewards Cards to Blackhawk, incurring the $3,000 fee, every 4-6 months. As of February 24, 2017, the Debtors estimate that they owe Blackhawk approximately $10,000, on account of prepetition obligations relating to the Rewards Cards.

18. The Debtors seek the authority to continue to honor the Rewards Cards in the ordinary course of business during the pendency of these chapter 11 cases, whether issued before or after the Petition Date, consistent with past practices, and to pay any outstanding prepetition obligations to Blackhawk relating to the Rewards Programs.

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[6] As a courtesy to customers, the Debtors issue approximately $20,000 Rewards Cards to replace lost, stolen or expired Rewards Cards each month.

[7] The Debtors anticipate they will issue approximately up to 1000 additional Rewards Cards with an expected redemption value of $53,000 in connection with past Rewards Program promotions.

[8] The face value of outstanding Rewards Cards is approximately $2,994,000; however, in the ordinary course of business, the Debtors assign a lower expected redemption value based on historical usage.

c. Customer Deposits

19. When a customer purchases merchandise that requires delivery and/or installation – e.g., a washing machine or refrigerator – he or she typically pays the full purchase price and such payment is recorded as a deposit (a "Customer Deposit")[9] in the Debtors' accounting system. Upon completion of delivery and/or installation, the Customer Deposit is reclassified as a sale and certain other accounting entries are made – e.g., a cost of goods sold is assigned. As of March 3, 2017, approximately $54,000,000 of Customer Deposits are recorded in the Debtors' accounting system.

20. Customers do not typically seek to cancel purchases prior to delivery and obtain a refund of the purchase price paid while it is classified as a Customer Deposit. However, the Debtors anticipate that customers may seek to do so if they face delivery delays as a result of these bankruptcy cases or if they are concerned that the Debtors will not deliver and/or install merchandise purchased prior to the Petition Date. Customers may request refunds of Customer Deposits directly from the Debtors or they may contact their credit card companies to dispute the charges associated with prepetition Customer Deposits. As a result, even if the Debtors refuse to refund them directly, customers may still obtain refunds of prepetition Customer Deposits by disputing the credit card charges associated with such Customer Deposits.

21. The Debtors seek the authority to continue recording Customer Deposits in accordance with existing accounting practices and in the ordinary course of business during the pendency of these chapter 11 cases. The Debtors also seek authority to cancel pending delivery and/or installation orders and refund Customer Deposits recorded prior to the Petition Date

[9] As a result of user error, some purchases that should be recorded as deposits are recorded as credits. For purposes of clarity, the term "Customer Deposits" also includes credits that should have been recorded as deposits.

regardless of whether such refunds are issued in the form of direct payments to customers or account debits charged by credit card companies in connection with disputed charges.

d. Return and Price Match Policies

22. The Debtors are proud to offer a hassle-free returns and exchanges, and to match competitors' pricing. The Debtors view their return policy (the "Return Policy") and the price match policy (the "Price Match Policy") as key customer services that also drive sales by increasing customer confidence.

23. Under the Return Policy, with certain exceptions[10], merchandise can be returned or exchanged within 30 days provided that it is in like-new condition and the customer presents the original sales receipt or packing slip. Refunds are typically issued using the same payment method as the original purchase. Refunds over $250 are made by check if the original payment method was cash or check. The Debtors estimate that returns and/or exchanges under the Return Policy account for approximately 0.20-0.30% of total sales.

24. Under the Price Match Policy, if a customer purchasing an eligible product[11] finds a current lower advertised price on the identical, in-stock product from a local retailer or certain major online retailers, the Debtors will match competitors' pre-tax price. The Debtors also match hhgregg.com prices on in-store purchases and in-store prices on hhgregg.com purchases. Furthermore, if the Debtors lower their price during the 30 day period after a purchase, they will

[10] In limited cases, shorter or longer return and/or exchange periods apply to various types of merchandise or online purchases of merchandise of specific manufacturers. Certain other purchases – e.g., subscription fees or installation services – are nonrefundable, and state law may limit returns and/or exchanges of limited types of merchandise, such as mattresses.

[11] Not all products are included in the Price Match Policy. For example, the Price Match Policy does not apply to hhgregg.com products which are only sold online, products offered by third party sellers on hhgregg.com, purchases at Fine Lines department stores or computers and tablets (unless the Debtors lower their price during the 30 day period following a purchase).

also match their own lower price. Price adjustments under the Price Match Policy account for approximately 0.04-0.07% of the Debtors' total sales.

25. The Debtors seek the authority to maintain or change their Return and Price Match Policies in the ordinary course of business during the pendency of these chapter 11 cases. The Debtors also seek authority to issue refunds and/or make exchanges in connection with purchases made prior to the Petition Date consistent with the Return and Price Match Policies and past practice.

e. Warranty Programs

26. The Debtors offer warranties to customers under several different programs (collectively, the "Warranty Programs"). The Debtors sell warranties covering certain lower cost merchandise – e g., small appliances and less expensive electronics – and administer such policies in house (collectively, the "Small Appliance Warranties"). The Debtors also sell warranties covering higher cost merchandise – e.g., large appliances and more expensive electronics – that are administered by a third party, Warrantech (collectively, the "Warrantech Warranties" and together with the Small Appliance Warranties, the "Warranties").

27. The Warranties each have a set term, and take effect after the manufacturer's warranty (if any) expires. When a customer purchases a Small Appliance Warranty, the Debtors keep the full purchase price and are liable for any valid subsequent claims until the Small Appliance Warranty expires. When a customer purchases a Warrantech Warranty, the Debtors remit a portion of the purchase price to Warrantech. After the manufacturer's warranty (if any expires), Warrantech or both Warrantech and the Debtors are liable for valid subsequent claims until the Warrantech Warranty expires. Liability for claims under the Warrantech Warranties is allocated between Warrantech and the Debtors in accordance with a master services agreement.

When certain products covered by a Warrantech Warranty needs to be replaced, Warrantech pays the Debtors to fulfill the replacement.

28. Warrantech invoices the Debtors weekly, and the Debtors typically reconcile such invoices monthly. As of March 3, 2017, the Debtors estimate that (a) outstanding invoices and unbilled accrued costs owing to Warrantech total approximately $6,550,000, and (b) amounts owing to the Debtors in connection with fulfilling replacements under the Warrantech Warranties total approximately $3,676,000.[12] As of the Petition Date, the Debtors have recorded estimated liabilities of approximately $557,000 in connection with the Small Appliance Warranties.

29. The Debtors seek the authority to continue to honor the Warranties in the ordinary course of business during the pendency of these chapter 11 cases, whether purchased before or after the Petition Date, consistent with past practices, and to pay any outstanding prepetition obligations to relating to the Warranties including any amounts owed as of the Petition Date to Warrantech.

f. Repair Service Program

30. The Debtors provide repair services on furniture for one year following the purchase date (the "Repair Service Program"). The Debtors do not sell coverage under the Repair Service Program but are required to provide it because the furniture they sell is not covered by a manufacturer's warranty. When customers request repair services, the Debtors send third party providers (the "Service Companies") to complete the repairs. The Debtors pay the Service Companies for repair services provided to customers, and then recover those costs in the form of discounts provided by furniture vendors. The Debtors periodically reconcile costs paid to Service Companies with discounts provided by furniture vendors to ensure that the discounts provided are sufficient to cover costs incurred by the Debtors in connection with the Repair

[12] These amounts have not yet been fully reconciled and remain subject to reconciliation/verification.

Services Program. As of the Petition Date, Debtors estimate that amounts owing to Service Companies are approximately $47,000.

31. The Debtors seek the authority to maintain or change Repair Service Policy in the ordinary course of business during the pendency of these chapter 11 cases. The Debtors also seek authority to pay prepetition amounts owed to the Service Companies, and to offset those amounts against amounts owed to furniture vendors consistent with past practices.

g. Coupons and Discount Programs

32. The Debtors, from time-to-time, engage in the distribution of coupons and promotional materials to customers that are redeemable for a certain dollar amount or percentage discount (the "Coupon and Discount Programs"). The Debtors believe that these coupons and discounts result in significant incremental revenue (net of the applicable discount). The Debtors seek the authority to continue to honor coupons and discounts, and to maintain or change the Coupon and Discount Programs in the ordinary course of business during the pendency of these chapter 11 cases.

C. Consignment Arrangements

33. Prior to the commencement of these chapter 11 cases, in the ordinary course of business, and as is customary in the retail sector, the Debtors instituted and engaged in certain consignment arrangements (collectively, the "Consignment Arrangements"). Specifically, the Debtors are party to consignment agreements with certain vendors and sell merchandise provided by such vendors on a consignment basis (respectively, the "Consignment Agreements", the "Consignment Vendors", and the "Consignment Merchandise"). Typically, the Consignment Agreements provide that the Debtors will make weekly or monthly payments to the Consignment Vendors for Consignment Merchandise purchased since the last payment.

34. Consignment Arrangements of this kind are common in the retail sector, and permit the Debtors to offer a wider range of merchandise while incurring lower up-front costs and less risk.

35. As of the Petition Date, the Debtors estimate that Consignment Vendors are owed approximately $1,700,000 under the Consignment Agreements in connection with Consignment Merchandise sold prior to the Petition Date. Certain of the Consignment Vendors may have valid perfected security interests in the Consigned Merchandise.

36. The Debtors seek the authority to continue to maintain or change the Consignment Arrangements in the ordinary course of business during the pendency of these chapter 11 cases and to pay prepetition amounts owed to the Consignment Vendors.

RELIEF REQUESTED

37. By this motion, the Debtors request authorization, but not direction, pursuant to sections 105(a), 363(b), 503(b)(1), 1107(a), and 1108 of the Bankruptcy Code, (a) to continue, maintain, implement new, and/or terminate any Customer Programs or Consignment Arrangements, in their business judgment, in the ordinary course of business, (b) to pay, honor, and otherwise satisfy, in the Debtors' business judgment, their prepetition obligations thereunder in a manner consistent with past practice, and (c) to pay, honor, or otherwise satisfy prepetition processing costs and fees associated with the Customer Programs and Consignment Arrangements, including to the Plastics Vendors (collectively, the "Customer and Consignment Obligations"). The Debtors also request the Court to authorize and direct the Debtors' Banks to receive, process, honor, and pay all checks and electronic payment requests relating to the foregoing.

BASIS FOR RELIEF

A. Honoring the Customer and Consignment Obligations Is in the Best Interests of the Debtors' Estates.

38. Pursuant to section 503(b)(1) of the Bankruptcy Code, a debtor may incur, and the court, after notice and a hearing, shall allow as administrative expenses, among other things, "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1). In addition, pursuant to section 363(b) of the Bankruptcy Code, a debtor may, in the exercise of its sound business judgment and after notice and a hearing, use property of the estate outside of the ordinary course of business. *Id.* § 363(b); *see also Fulton State Bank v. Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) (noting that the criterion for approval of a transaction under section 363(b) is whether debtor has "an articulated business justification" (citing *The Inst.'l Creditors of Cont'l Airlines v. Cont'l Air Lines, Inc.*, 780 F.2d 1223, 1225 (5th Cir. 1986))); *In re Efoora, Inc.*, 472 B.R. 481, 488 (Bankr. N.D. Ill. 2012) (same). The Debtors submit that the use of estate funds for payment of certain of the Customer and Consignment Obligations is permitted by sections 503(b)(1) and 363(b) as necessary costs of preserving the estates. Honoring the Customer and Consignment Obligations will enable the Debtors to (a) retain, maintain, and create valuable customer relationships, and (b) ensure that the Debtors are able to continue providing a broad range of merchandise – as their customers expect and demand – without incurring additional up-front costs or risk, both of which will strengthen the Debtors' business and prospects for successfully prosecuting these chapter 11 cases. *See e.g., In re UAL Corp.*, 2002 WL 34344254, at *1 (Bankr. N.D. Ill. Dec. 9, 2002).

39. In addition, under section 363(b), a court may authorize a debtor to pay certain prepetition claims. *See In re Kmart Corp.*, 359 F.3d 866, 872 (7th Cir. 2004) (suggesting payments of prepetition debts may be authorized under Section 363(b)(1) under certain

circumstances); *In re MPC Computs., LLC,* No. 08-12667 (Bankr. D. Del. Nov. 10, 2008) (authorizing, pursuant to section 363, the payment of prepetition claims of suppliers)*; In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (referring to the court's earlier order authorizing payment of prepetition wages pursuant to section 363(b) of the Bankruptcy Code); *Armstrong World Indus., Inc. v. James A. Phillips, Inc.* (*In re James A. Phillips, Inc.*), 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 of the Bankruptcy Code to allow a contractor to pay prepetition claims of suppliers who were potential lien claimants because the payments were necessary for general contractor to release funds owed to debtors). The criteria for approval, therefore, are whether the transaction makes good business sense, in which event the creditors as a whole should benefit, and whether it preserves the priorities among the creditors. *In re UAL Corp.*, 443 F.3d 565, 571–72 (7th Cir. 2006) (citing *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991); *In re Kmart Corp.*, 359 F.3d 866, 872-73 (7th Cir. 2004)). "[T]he debtor must articulate some business justification, other than the mere appeasement of major creditors." *James A. Phillips, Inc.* 29 B.R. at 397*; see also Comm. of Equity Sec. Holders v. Lionel Corp.* (*In re Lionel Corp.*), 722 F.2d 1063 (2d Cir. 1983).

40. Further, sections 1107(a) and 1108 authorize a debtor in possession to continue to operate its business. 11 U.S.C. §§ 1107(a), 1108. Indeed, a debtor in possession operating a business under section 1108 of the Bankruptcy Code has a duty to protect and preserve the value of its business, and prepetition claims may be paid if necessary to perform the debtor's duty. *See In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) ("There are occasions when this duty can only be fulfilled by the preplan satisfaction of a prepetition claim."). The *CoServ* court specifically noted that the pre-plan satisfaction of prepetition claims would be a valid

exercise of the debtor's fiduciary duty when the payment "is the only means to effect a substantial enhancement of the estate." *Id.*

41. To supplement the explicit powers described above, section 105(a) of the Bankruptcy Code empowers the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). A bankruptcy court's use of its equitable powers to "authorize the payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the Debtors is not a novel concept." *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). "Under 11 U.S.C. § 105, the court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the Debtors." *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (*citing Ionosphere Clubs*, 98 B.R. at 177). The Debtors submit that honoring their prepetition obligations under the Customer Programs and Consignment Arrangements, and the continuation of such programs in the ordinary course of business on a postpetition basis, is imperative to the Debtors' ongoing operations and their continued viability.

42. The necessity of the Customer Programs and Consignment Arrangements in the Debtors' industry cannot be overstated and many of the Customer Programs and Consignment Arrangements are standard practice. If the Debtors' obligations under the Customer Programs are not honored or if the Debtors are unable to maintain the variety and quality of inventory facilitated by the Consignment Arrangements, the Debtors risk alienating their customers and encouraging them to take their business to the Debtors' competitors. This is particularly critical, as the Debtors are attempting to increase customer engagement, frequency, and retention. These efforts will be stymied if customers are unable to take advantage of the very inducements that the Debtors are utilizing to drive customer traffic and sales or if the Debtors' stores do not meet

customer expectations. The prepetition obligations owed by the Debtors pursuant to the Customer Programs and Consignment Arrangements qualify for postpetition payment because if the Debtors do not honor these obligations, the Debtors' hard-earned reputation and brand loyalty will be adversely affected, irreparably harming the Debtors' prospects to maximize value through these chapter 11 cases. *See In re CoServ*, 273 B.R. at 497 (noting that one example where a debtor-in-possession can only fulfill its fiduciary duty by pre-plan satisfaction of a prepetition claim is "prepetition . . . claims of . . . a customer which, if not honored, could so harm the Debtor's good will as to destroy its going concern value"); *In re Equalnet Commc'ns Corp.*, 258 B.R. 368, 370 (Bankr. S.D. Tex. 2000) (holding that "such a failure to pay and its consequent loss of customer base would impair value of the business on either a going concern or liquidation basis").

43. Simply put, the continuity, viability, and revitalization of the Debtors' businesses is dependent upon the development and maintenance of the loyalty of their customers. The Debtors expect to have sufficient resources available to maintain all of their Customer Programs and Consignment Arrangements, to the extent described herein, and to pay their Customer and Consignment Obligations.

44. Furthermore, certain of the Consignment Vendors may have valid perfected security interests in the Consignment Merchandise. Accordingly, paying those Consignment Vendors would leave other creditors in no worse position than they would be if such Consignment Vendors' prepetition claims remain unpaid.

45. Considering the potential loss of competitiveness, goodwill, and relationships, and the resulting negative impact on the Debtors' business and reorganization efforts, the Debtors

submit that the requested relief is in the best interests of the Debtors, their estate, and creditors, and therefore the motion should be approved in all respects.

B. The Banks Should Be Authorized to Honor and Pay Checks and Electronic Payment Requests in Connection with the Customer Programs and Consignment Arrangements.

46. In addition, by this Motion, the Debtors request that their Banks be authorized, when requested by the Debtors, to receive, process, honor, and pay any and all checks presented for payment of, and to honor all fund transfer requests made by the Debtors related to the Customer and Consignment Obligations, whether such checks were presented or fund transfer requests were submitted before or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments on account of the Customer and Consignment Obligations. The Debtors represent that these checks are drawn on identifiable disbursement accounts and can be readily identified as relating directly to the authorized payment of the Customer and Consignment Obligations. Accordingly, the Debtors believe that checks other than those relating to authorized payments will not be honored inadvertently.

47. For the foregoing reasons, the Debtors believe that granting the relief requested herein is appropriate and in the best interests of their estates and creditors.

C. Request for a Waiver of Bankruptcy Rule 6003(b).

48. Under Rule 6003 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Court may authorize the Debtors to satisfy the Customer and Consignment Obligations because such relief is necessary to avoid immediate and irreparable harm. Immediate and irreparable harm exists where the absence of relief would impair a debtor's ability to reorganize or threaten the debtor's future as a going concern. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of "immediate and irreparable harm" in relation to Bankruptcy Rule 4001(c)(2)).

49. As described above, the Customer and Consignment Obligations are integral to the Debtors' continued operations because they are necessary to maintain and build the confidence and goodwill of the Debtors' customers. The Debtors are at a critical juncture at which they must make every effort to retain customer support, drive revenues, and maximize cash flow. The Debtors' inability to honor the Customer and Consignment Obligations could materially impair these efforts and thwart the Debtors' chapter 11 cases before they have had a chance to begin. Accordingly, the Debtors submit that they have satisfied the requirements of Bankruptcy Rule 6003 to support the relief requested on the terms described herein.

D. Request for a Waiver of Bankruptcy Rule 6004(h).

50. Pursuant to Bankruptcy Rule 6004(h), "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). As set forth throughout this Motion, any delay in the Debtors' ability to continue, and pay, honor, or otherwise satisfy their obligations related to the Customer and Consignment Obligations would be detrimental to the Debtors, their creditors and estates, and would impair the Debtors' ability to optimize their business performance at this critical time as they begin the chapter 11 process.

51. For this reason and those set forth above, the Debtors submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent applicable.

E. Reservation of Rights.

52. Nothing in this Motion or the proposed order attached hereto (a) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors and their estates, (b) shall impair, prejudice, waive or otherwise affect the rights of the Debtors and their

estates with respect to the validity, priority or amount of any claim against the Debtors and their estates, (c) shall be construed as a promise to pay a claim. Furthermore, all parties' rights to assert whatever interests they may have in the Consignment Merchandise are hereby reserved.

NOTICE AND NO PREVIOUS REQUEST

53. Notice of this Motion has been provided to: (i) the Office of the United States Trustee for the Southern District of Indiana; (ii) the Debtors' thirty (30) largest unsecured creditors; and (iii) counsel to the Agent for the Debtors' prepetition secured lenders and the lenders providing debtor in possession financing, c/o Sean M. Monahan, Choate, Hall & Stewart LLP, Two International Place, Boston, MA 02110. Notice of this Motion and any order entered hereon will be served in accordance with Local Rule B-9013-3(d). In light of the nature of the relief requested, the Debtors submit that no other or further notice is necessary.

54. No previous request for the relief sought herein has been made to this or any other Court.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter the order substantially in the form annexed hereto as Exhibit A, granting the relief requested herein and such further relief as may be just and proper under the circumstances.

Respectfully submitted,

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